Filed 1/7/09 In re D.K. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re D. K., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D. K., Defendant and Appellant.	G040042 (Super. Ct. No. DL030316) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick Aguirre, Judge. Affirmed.

William Flenniken, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, and Gary W. Schons, Assistant Attorney General for Plaintiff and Respondent.

* * *

D. K. appeals from the court's order declaring him a ward under Welfare and Institutions Code section 602.[1] He argues the court abused its discretion when it found him unsuitable for deferred entry of judgment (DEJ) under section 790 et seq. We affirm.

FACTS

In a section 602 petition, the People alleged D.K. committed two counts of felony grand theft (Pen. Code, § 487, subd. (a)) and two counts of misdemeanor petty theft (Pen. Code, §§ 484, subd. (a), 488.) The prosecutor determined D.K. was eligible for DEJ under section 790, subdivision (a). The court ordered the probation officer to prepare a report evaluating D.K.'s suitability for DEJ.

The Probation Department filed a DEJ suitability report on D.K., which reported the following based on police records: "Under Miranda, [D.K.] reported he met up with [J.L., another minor,] around 4:00 a.m. because he was bored. [J.L.] told him, 'I have a plan for tonight.' [J.L.] told him that they could walk around the neighborhood and take items from unlocked vehicles. [J.L.] and he attempted to open three vehicles near his residence. He then told [J.L.] he was afraid that someone would recognize him

[1] All statutory references are to the Welfare and Institutions Code section unless otherwise stated.

and told [J.L.], 'not here, it's my neighborhood.' They then walked about three to four blocks away. He admitted he attempted to open a few doors to some of the vehicles; however told [J.L.], 'I can't do this.' [J.L.] then told him to stay with the bags that they had brought and he would be back. He was waiting in the area where the bags were when the police arrived. He admitted he helped conceal the items in the backpacks and that he was aware that what they were doing was wrong." According to the probation report, police records further showed that two "backpacks and a pink bag were located in some bushes where [D.K.] had been located." The bags contained "money, electronic devices such as iPods, navigational systems, portable play stations, glasses," marijuana and Ecstasy. J.L.'s cell phone revealed J.L. had text messaged that night, "Had come across a gun." J.L. told police the gun was in a backpack. An "officer retrieved the semi-automatic .22 caliber handgun . . . loaded with seven bullets" and with "a bullet inside the chamber." J.L. admitted "it was his idea to break into cars because, '[he] needed some quick money,'" and "the Ecstasy tablets were his."

In another section of the probation report, the probation officer recounted D.K.'s interview with the probation department. In that interview, D.K. "admitted he attempted to break into approximately 15 vehicles and only found two of the vehicles unlocked." "He entered the two vehicles and stole an iPod and some change." "He admitted that [J.L.] had found a gun inside one of the vehicles." D.K. "first experimented with marijuana at age 16 and had used marijuana twice. He admitted he tried Ecstasy on one occasion recently. He admitted he smokes about five cigarettes daily and consumes alcohol about once a month." The probation officer believed D.K. was not a suitable candidate for DEJ because he knew about the loaded gun that endangered the community, J.L. and D.K. The probation officer recommended D.K. be committed "to an appropriate facility for 60 days."

At a hearing to determine whether D.K. should be granted DEJ, D.K., then 17 years old, testified as follows. At 2:00 a.m. on the night in question, his friend, J.L.,

phoned and said "he was bored too." The two met outside D.K.'s house, "talking and trying to find something to do." Around 4:00 a.m., J.L. showed D.K. how to break into cars. They tried to break into a "couple of cars" near D.K.'s house, but D.K. did not want to be recognized and arrested so they moved "somewhere else." The two separated. On his own, D.K. "tried several cars, and about two cars opened, and [he] got a purse and coins." At that point, D.K. did not feel like continuing, so he went and met J.L. again, and said he was not "going to do this anymore." J.L. instructed D.K. to take J.L.'s "stuff [including a backpack] and go somewhere to wait for him." D.K. helped put some stolen items into the backpacks. Eventually the police approached D.K. After D.K. was arrested and taken to the police station, the police told him there was a gun in the backpack. D.K. did not have a cell phone that night.

The court found D.K. was not a suitable candidate for DEJ, identifying many aggravating factors: (1) D.K. tried to burglarize about 15 vehicles; (2) he stated in a police interview he knew J.L. "had a firearm that he had stolen from a car, and that it was on his person"; (3) the gun was loaded; (4) D.K. and his friend communicated through text messages during the incident; and (5) D.K. had "tried marijuana and Ecstasy before."

Defense counsel then asked the court to order the probation officer who had prepared the DEJ suitability report to testify in court as to when D.K. learned of the gun and whether he communicated with J.L. by cell phone. The court denied defense counsel's request, stating that regardless of when D.K. knew about the gun or whether he received J.L.'s text message, the court still found D.K. and J.L. burglarized a vehicle and then "decided to go out and burglarize vehicles independently of each other." The court emphasized that, once D.K. was no longer with J.L. and under his influence, D.K. could have walked home if his "good conscience and . . . good moral character [had] come into play." "Instead [D.K.] went and burglarized 15 vehicles on his own, not with [J.L.] present, forcing him to burglarize those vehicles. So it shows that . . . he still had that intent to carry out criminal activity, not with just one vehicle." The court therefore

concluded "that bringing in the probation officer [would not] change this court's mind" about D.K.'s unsuitability for DEJ.

D.K. admitted the petition's allegations; the court found them to be true. The court declared D.K. a ward under section 602 and committed him to juvenile hall for 30 days. The court told D.K. that if he had tried to burglarize only one car, the court would have granted him DEJ. But because he tried "a series of cars," knowing he was "doing something wrong on each one," the court could not find him to be a suitable candidate for DEJ. Nonetheless, the court had exercised leniency by committing him for 30 days even though the prosecution had asked for a 60-day commitment.

DISCUSSION

D.K. contends the court applied "an erroneous legal standard" by assessing "the seriousness of the crime rather than 'whether the minor will derive benefit from "education, treatment, and rehabilitation."'" He asserts an "aggravating factor traditionally is a 'seriousness of the crime' issue." According to D.K., when the court found he "burglarized fifteen vehicles on his own without [J.L.] present," the "court reasoned that the more cars that were involved, the more serious was the crime." D.K. further contends the court's finding he burglarized 15 cars without J.L. present is unsupported by the record. D.K. concludes the court abused its discretion by applying the wrong legal standard and/or by basing its decision on a finding unsupported by substantial evidence.

Under section 790 et seq. governing DEJ (the DEJ law), first time juvenile felons may have their charges dismissed and records sealed upon successfully completing probation. (§§ 790, subd. (a), 793, subd. (c).) "The [DEJ law] provide[s] that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of

judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed." (*Martha C. v. Superior Court* (2003) 108 Cal.App. 4th 556, 558.)

Under the procedure mandated by the DEJ law, the first step is taken by the prosecutor, who must determine whether the minor is eligible for DEJ. (§ 790, subd. (b).) To be eligible for DEJ, a minor must meet six requirements listed in section 790, subdivision (a).[2] If the prosecutor finds the minor is eligible for DEJ, the prosecutor must file a written declaration with the court, and notify the minor and his or her attorney. (§ 790, subd. (b).) "If the minor consents and waives his or her right to a speedy jurisdictional hearing, the court may refer the case to the probation department . . . . When directed by the court, the probation department shall make an investigation and take into consideration the defendant's age, maturity, educational background, family relationships, demonstrable motivation, treatment history, if any, and other mitigating and aggravating factors in determining whether the minor is a person who would be benefited by education, treatment, or rehabilitation." (§ 791, subd. (b).) "Upon a finding that the minor is also *suitable* for [DEJ] and would benefit from education, treatment, and rehabilitation efforts, the court may grant [DEJ]." (§ 790, subd. (b), italics added.) "If the court, the prosecuting attorney, and the child's attorney do not

---

[2] Those requirements are: "(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense. [¶] (2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707. [¶] (3) The minor has not previously been committed to the custody of the Youth Authority. [¶] (4) The minor's record does not indicate that probation has ever been revoked without being completed. [¶] (5) The minor is at least 14 years of age at the time of the hearing. [¶] (6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code." (§ 790, subd. (a).)

agree that the child should receive [DEJ], the court may examine the record and make an independent determination." (Cal. Rules of Court, Rule 5.800(b)(2).) "The court shall make the final determination regarding education, treatment, and rehabilitation of the minor." (§ 791, subd. (b).) A court may deny DEJ to a minor otherwise eligible if it deems the minor unsuitable for education, treatment, or rehabilitation. (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 607.) We review a trial court's finding of suitability for DEJ for abuse of discretion. (*Ibid.*)

We turn to D.K.'s contention insufficient evidence supports the court's finding he acted alone while trying to break into 15 vehicles, a number the court at one point acknowledged was approximate. According to the probation report, in D.K.'s interview with the probation department, he "admitted he attempted to break into approximately 15 vehicles and only found two of the vehicles unlocked." From this evidence the factfinder could reasonably infer D.K. acted alone when trying to enter the 15 cars, since he testified at the hearing he was on his own when he opened two cars. Moreover, the probation report states D.K. told the police he and J.L. "attempted to open three vehicles near his residence" before moving to another location and splitting up. Thus, even if we assume D.K. admitted he tried to burglarize a *total* of 15 cars that night (with or without J.L.), D.K. attempted to enter 12 vehicles on his own, a number approximating 15. Viewing the evidence in the light most favorable to the judgment (*People v. Johnson* (1980) 26 Cal.3d 557, 575-578), substantial evidence supports the court's finding.

We turn to D.K.'s contention the court applied an erroneous legal standard in determining his suitability for DEJ. Contrary to D.K.'s assertion, the court did evaluate whether D.K. would benefit from education, treatment and rehabilitation. Section 791, subdivision (b) prescribes factors to be considered by the probation department in "determining whether the minor is a person who would be benefited by education, treatment, or rehabilitation." These factors are "the defendant's age, maturity,

educational background, family relationships, demonstrable motivation, treatment history, if any, and other mitigating and aggravating factors . . . ." (*Ibid.*) Before the court rendered its finding on D.K.'s suitability for DEJ, it discussed D.K.'s age, maturity, and efforts to do well at school, at home and in a church group, as well as his being "an obedient son." The court then identified the aggravating factors that D.K. "attempted to burglarize approximately 15 vehicles" even when he was away from J.L.'s influence and "should have said, 'You know what? This is wrong. I'm going to go home.'" The court further noted D.K. had "tried marijuana and Ecstasy before," and that he and J.L. embarked on their "spree" "out of boredom." Thus, the court assessed whether D.K. at any time exhibited a "good conscience and . . . good moral character." The number of cars D.K. tried to burglarize on his own out of boredom and his failure to simply go home, as well as his prior drug use, were evidence supporting the court's determination that D.K. was not suitable for DEJ. The court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.